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CASE NO. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 2002

ALBERT MACKLIN,

Petitioner,

v.

THE CITY OF NEW ORLEANS, POLICE CHIEF, RICHARD PENNINGTON, MAYOR, MARC MORIAL, DEPUTY POLICE, CHIEF RONALD SERPAS AND NEW ORLEANS DISTRICT ATTORNEY HARRY CONNICK.

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts commit manifest error and manifest injustice by ruling that a civil servant is not entitled to due process as pursuant to the United States and Louisiana Constitution before an immediate emergency suspension (deprivation) of 120-days without pay?

   A. Is a 120-day suspension a "taking" as pursuant to the 5th Amendment of the United States Constitution?

   B. Should a pre-suspension hearing (due process) be conducted before a 120-day emergency suspension can be implemented when there was no prompt post-suspension hearing?

2. Did the lower courts commit manifest error and **manifest injustice** by denying petitioner's motion for summary judgment and then granting defendant's motion for summary judgment to dispose of the case?

   A. When defendants failed to oppose plaintiff's motion for summary judgment on two occasions, should the lower court have ruled in favor of the plaintiff and granted plaintiff's motion for summary judgment base on its local rules.

3. Are the issues brought by petitioner wholly and totally without merit? Whether F. R. A. P., Rule 38 sanctions is a deterrent for persons with limited means to bring discrimination case?

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Names of all parties appear in the caption of the case.

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IN THE
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ALBERT MACKLIN,
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THE CITY OF NEW ORLEANS, Et Al.,
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Albert Macklin respectfully petitions for a writ of certiorari to review the judgment of the courts below.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

On May 31, 2002, the United States Court of Appeals for the Fifth Circuit issued its opinion, affirming the decision of the District Court. As far as Petitioner is aware, the district court and court of appeals decisions are unreported. Both Judgments are reproduced in the appendix.

STATEMENT OF JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review by writ of certiorari is 28 U. S.C. Section 1254 (1) et seq. and 28 U. S.C. Section 1291.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution, Article I Sections 2 and 3 of the Louisiana State Constitution, 42 U. S. C. Section 1983, Section 704 of Title VII, 42 U.S.C. section 2000(a), Rule 56 of the Federal Rules of Civil Procedure, Local Rule 2.10E of the Uniform Local Rules of the United States District Courts for the Eastern District of Louisiana are involved.

The major issue is whether respondents violated petition's due process right and in turn violated 42 U. S.C. Section 1983.

According to 42 U.S.C. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..

5th Amendment of U. S. Constitution provides that:

> "No person. . . shall be deprive of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner brought this action seeking relief as authorized by 42 U. S. C. Section 1983 et seq., Title VII of the Civil Rights Act as amended 1991, and the 5th and 14th Amendments of United States Constitution. Petitioner's case revolves around the due process rights and property interest of a civil servant-public employee. Petitioner, was a commission officer with the New Orleans Police Department. On May 10, 1999, Albert Macklin, a New Orleans Civil Servant was arrested and incarcerated for allegedly committing an aggravated battery that happened on July 26, 1998. On July 26, 1998, a paranoid schizophrenic person was causing a disturbance at a Shell Oil gas station. Petitioner was off-duty and asked Mr. Holmes to leave or he may be arrested. Mr. Holmes refused and struck Mr. Macklin in the neck and face. Petitioner in self-defense struck Mr. Holmes. One year later, the respondents gave Mr. Macklin an immediate emergency suspension for 120-days without pay, and arrested Mr. Macklin. The New Orleans Police Department failed to charge and arrest Len Holmes with attempted murder or battery on a police officer or for causing a disturbance, however, the NOPD charged and arrested Macklin on a preposterous battery charge. The New Orleans District Attorney's Office indicted Macklin with a bill of information instead of a grand jury indictment.

Petitioner filed his civil service appeal on May 11, 1999. The administrative civil service hearing (post-suspension hearing) was not conducted immediately Petitioner was terminated February 18, 2000. Petitioner timely filed an appeal for his termination. Petitioner and several other African American Police Officers asserted that

White New Orleans Police Officers who had criminal charges pending were given desk duty, and were treated better than African American New Orleans Police Officers. The African American New Orleans Police Officers were treated harshly and given a 120-day emergency suspension without pay when there was no emergency. Four month's without pay is/was devastating to appellant's family and appellant nearly lost his house.

At the criminal trial, the court found that the alleged victim to be the aggressor and appellant was found NOT GUILTY.

The respondent have a policy and custom of giving African-American Police Officers an immediate emergency suspension without pay, without the opportunity to work details (employment outside the New Orleans Police Department), without notice and the opportunity to be heard, and then arrest plaintiff and other African American Police Officers as well. This custom and policy violated United State Constitutional right of due process. The respondents had other ways of disciplining petitioner, such as, suspension with pay, administrative leave, etc. Moreover, the respondent's had a policy of giving White Officers with criminal charges pending, desk duty or suspension with pay. These customs or policy gives rises to an inference of discrimination and retaliation. The respondents harshly discriminated and retaliated against plaintiff in violation of the equal protection clause. Respondents gave other Black Officers 120-day suspensions as well. (George Lee v. City of New Orleans, U. S. 5th Circuit Court of Appeals, Docket Number CA 01-30875 and Donald Brooks v. City of New Orleans, 5th Circuit Court of Appeals, Docket Number CA 01-31013) Petitioner sought damages pursuant to 42 U. S.C. Section 1983 et seq., and 42 U. S.C. Section 2000.

As a civil servant, petitioner has certain due process rights and privacy rights afforded by the Louisiana State Constitution and United States Constitution. Before the appellant was arrested and suspended, appellant was not given notice or an opportunity to be heard (due process), and/or a "Name Clearing Hearing" before the deprivation of his liberty and property interest were taken. Since the alleged battery happened one year before his suspension, and the post-suspension hearing was conduct one year after the suspension, respondents should have given petitioner notice and the opportunity to be heard, and a full-blown pre-deprivation hearing allowing petitioner to confront and cross examine his accusers.

DISPOSITION IN THE COURTS BELOW.

On May 10, 2000, appellant filed suit seeking relief as authorized by 42 U.S.C. Section 1983. Petitioner demanded a jury trial. On October 6, 2001, a preliminary conference was held. The trial was set for May 7, 2001. The parties' witness and exhibit list were due on February 16, 2001. The district court stated it **would not** permit any witness, expert or fact to testify or any exhibits to be used unless there was compliance with this order as it pertain to the witness and/or exhibits. On January 24, 2001, petitioner propounded appellees interrogatories, request for admission of facts and request for production of documents. On February 16, 2001, petitioner filed his witness and exhibit lists. The respondents never submitted their witness or exhibit list. On March 5, 2001, petitioner set a conference for March 7, 2001, to discuss appellees' failure to answer Mr. Macklin's discovery. The New Orleans District Attorney was dismissed out of the case. On March 7, 2001,

a conference was held with George Wallace and petitioner's attorney. On March 12, 2001, petitioner filed a motion to compel and a motion to have his request for admission of fact deemed admitted. On March 27, 2001, the court granted petitioner's motion to compel and gave appellees 7 days from March 27, 2001, to answer petitioner's request for admission of facts or they would be deemed admitted. The City of New Orleans and respondents failed to answer Macklin's request for admission of facts, and has never answered Macklin's request for admission of facts. Macklin's facts were admitted by default. On April 16, 2001, appellant filed his motion for summary judgment. On April 17, 2001, appellant filed a motion to preclude appellees from introducing documents into the record, deeming plaintiff's request for admission of facts admitted, and a ruling for summary judgment in favor of petitioner. Although the trial court's order stated that if a witness or exhibit is not timely filed, the exhibit will be excluded, the court inconsistently denied petitioner's motion to exclude the appellees exhibit list. Nevertheless, the trial court set Macklin's motion for summary judgment for May 2, 2001. Respondents failed to answer Macklin's motion for summary judgment. According to the local rules of the U. S. District Court of the Eastern District and Rule 56 of the Federal Rules of Civil Procedure, if the opposing party does not contest the facts, the facts shall be deemed admitted and the court shall entered a judgment. Respondents failed to motion the court for a continuance of petitioner's motion for summary judgment. The trial court inconsistently continued Macklin's motion for summary judgment until June 13, 2001, and allowed the respondents the opportunity to oppose Macklin's motion for summary judgment until June 5, 2001. Ironically, the respondents failed to oppose Macklin's motion

for summary judgment for a second time. The trial court applied the rules of court inconsistently and continued Macklin's motion for summary judgment until September 5th, 2001, giving appellees another chance to oppose Macklin's motion for summary judgment. Appellant's motion for summary judgment went unopposed twice, therefore, judgment should have been rendered in Mr. Macklin's favor and damages awarded as prayed for. On July 10, 2001, appellees filed a motion for summary judgment. Although, the appellees failed to give the court a witness list and exhibit list, the court inconsistently and prejudicially allowed appellees to file a motion for summary judgment with exhibits. This was inconsistent with the previous trial court order. On August 8, 2001, the trial court granted appellees' motion for summary judgment(before September 6, 2001) and before the hearing on petitioner's motion for summary judgment. On August 31, 2001, the court dismissed petitioner's claim against the City of New Orleans and against Chief Pennington and Marc Morial. The trial court on November 20, 2001, incorrectly stated that there were cross motion for summary judgments, because the trail court gave respondents three opportunities to file its motion for summary judgment. On November 20, 2001, the Court granted respondents' motion for summary judgment. On November 26, 2001, the Court signed a judgment in favor of the respondents. Petitioner filed an appeal on August 27, 2001 and on November 29, 2001. On May 31, 2002, the U. S. Court of Appeals for the Fifth Circuit affirmed the lower court decision and granted sanctions of $ 1400.00 against appellant and his attorney for filing an appeal. The Fifth Circuit ruled that the appeal was totally without merit. Petitioner filed this writ to address his due process rights, the inconsistencies of the lower court's procedures, and

the Fifth Circuit's rule that petitioner's appeal was frivolous or totally without merit.

FACT MATERIAL TO THE ISSUES PRESENTED

1. Respondents gave petitioner an emergency suspension for 120-days without pay and without an immediate post-suspension hearing. Public employees have a property and liberty interest of employment. Appellant asserts that to deprive a civil servant of the property right of employment for 120-days is a "taking" as pursuant to the Due Process clause of the Louisiana Constitution and the United States Constitution. The lower courts ruled that due process (notice and opportunity to be heard before the suspension is done) does not apply to emergency suspension. The 5th Circuit Court of Appeal considered that raising this issue was totally without merit and applied sanctions.

2. Regarding procedure, the respondents failed to submit an exhibit or witness as per the court order. The respondents failed to answer petitioner's request for admission of facts. The respondent failed to answer petitioner's motion for summary judgment as per the local rule and thus, petitioner's facts were admitted. Respondents failed to oppose Macklin's motion for summary judgment for a second time. The trial court granted respondents' motion for summary judgment before the hearing on appellant's motion for summary judgment.

3. On May 31, 2002, the U. S. Fifth Circuit Court of Appeals affirmed the lower court's decision and granted sanctions stating that the appeal was totally without merit. Petitioner files this writ to this honorable court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The U.S. District Court for the Eastern District of Louisiana had original jurisdiction under related statutes: 28 U.S.C. section 1331, section 1343, section 1339, 42 U.S.C. section 2000e-5(f)(3), 42 U.S.C. section 1983.

REASONS FOR GRANTING THE WRIT

I. The court of appeals for the 5th Circuit erred by affirming the district court's ruling that due process does not apply to 120-day suspension without pay and without an immediate post-suspension hearing. The decision below conflicts with prior decisions regarding "due process" before a "taking" of property can be implemented.

One consistent and well settled constitutional right is that before a "taking of property or property interest", a citizen is entitled to a due process hearing before the deprivation of the property takes place. It is also well established that public employees/ civil servants have a property interest in their employment, and therefore, due process should be afford before the "taking" of that employment right.

In this particular instance, petitioner was a civil servant and a 25-year commission officer with the New Orleans Police Department. On May 10, 1999, the City of New Orleans gave petitioner an immediate 120-day

suspension without pay and arrested petitioner for allegedly committing an aggravated battery that happened on July 26, 1998. The City of New Orleans has a policy of giving an immediate emergency suspension for 120-days without pay and without a hearing. The question in this case is under what circumstance does the government implement a 120-day suspension without pay and without due process. The problem in the case is why the respondents implemented an emergency when the incident happened one year earlier. This government custom or policy violates the Due Process Clause as pursuant to the 5th Amendment of the United States Constitution[1]. Furthermore, the preamble of the Louisiana Constitution (Louisiana Declaration of Rights, as set forth in Article 1 of the Louisiana Constitution), establishes certain guaranties and protections for individual rights and liberties. . ., **the citizens of Louisiana have chosen a higher standard of individual liberty than that afforded by the Constitution of the United States of America**. . ." [2]

In particular instance, on July 26, 1998, a paranoid schizophrenic person was causing a disturbance at a Shell Oil gas station. Petitioner, while off duty and in self defense, defended himself from Mr. Holmes--a paranoid schizophrenic person. Petitioner was arrested and Mr. Holmes was not. This situation send a chilling effect to other police officers to think twice to protect and serve the citizen because of the way the government disciplines its police officers.

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1. 5th Amendment of U. S. Constitution provides that:

"No person. . . shall be deprive of life, liberty or property, without due process of law . . .

2. The Louisiana Constitution Article 1 as amended 1997.

It is well settled that Due Process requires notice and opportunity to be heard. The Due Process Clause of the Fifth and Fourteenth Amendments of the U. S. Constitution and the Louisiana Constitution protects an individual's property and liberty interest which is viewed as including an individual's freedom to work and earn a living and to establish a home and position in one's community [3, 4, 5]. In Louisiana, a permanent classified civil employee has a protected property interest in his/her job.[6].
The U.S. Supreme Court has also **consistently characterized the essential feature of the entitlement as the right to continued benefits, and any interruption in the flow of benefits as a deprivation of the interest.**
One essential principle of due process is that an individual facing a deprivation be given, "some kind of a hearing," the **opportunity to try to prevent the deprivation from happening.** [7]

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3. Section 1 Article 1 of the Louisiana Constitution provides that:
   All government, of right, originates with the people, is found on their will alone. . .

4 Article I, Section 2 of the Louisiana Constitution provides:
   No person . . . shall be deprive of life, liberty, or property, without due process of law . . .

5. *Board of Regents of State Colleges v. Roth,* 408 U. S. 564, 92 S. Ct 2701, 33 L. Ed 2d 548 (1972),

6. *Bell v. Dept. of Health and Human Resources,* 483 So. 2d 945, cert. denied 479 U. S. 827, 107 S.Ct. 105, 93 L. Ed 2d. 55(1986);

7. *Fuentes v. Shevin,* 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

8. *Atkins v. Parker,* 472 U. S. 115, 105 S.Ct. 2520, 86 L. Ed 2d 81 (1985);

9. *Memphis Light Gas&Water Division v. Craft,* 436 U. S. 1, 98 S.Ct. 1554, 56 L. Ed. 2d 30 (1978)

U. S. Eastern District Court of Louisiana Judge of Division G (now retired) held that due process applied to employment suspensions [10, 11, 12]. See: *George Lee v. City of New Orleans*, U. S. 5th Circuit Court of Appeal docket number CA 01-30875, U.S. D. C. No. 99CV 2952 G. However, trial court judge, in this instance, held that due process does not apply to employment suspensions. The judges in the U. S. Eastern District Court of Louisiana were unsure as to whether due process applies to employment suspensions. The U. S. 5th Circuit affirmed the judge in Division F ruling and held that due process does not apply to a 120-day emergency suspension without pay, and intimated that the Administrative civil service hearing is due process. Different judges of the very same court has substantial difference as to whether due process applied to employment suspension without pay.

The court of first instance and the U. S. Fifth Circuit Court of Appeals concluded that petitioner was given multiple opportunities to rebut the charges against him and was represented by counsel during the stage of the administrative process and therefore, a pre-suspension hearing and denial of a name clearing hearing is warranted. It appears that the lower courts suggest that due process is the Civil Service administrative process. Petitioner disagrees with this assumption.

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10. *See: Federal Deposit Ins. Corp. v. Mallen*, 486 U. S. 230, 240, 108 S. Ct. 1780, 1787, 100 L. Ed. 2d 265 (1988), a suspended bank president was entitled to due process through a notice and hearing.

11. *Barry v. Barchi*, 443 U. S. 55, 63-64, 99 S. Ct. 2642, 2649, 61 L. Ed. 2d 365 (1979), this honorable court held that a racetrack trainer suspended for fifteen days was entitled to a prompt post-deprivation hearing.

12. *Gross v. Lopez*, 419 U. S. 565, 574-575, 95 S. Ct. 729, 736 42 L. Ed. 2d 725, (1975), a ten-day suspension of students implicates a liberty and property interests requiring procedural due process.

The Courts below cited *Cleveland Board of Education v. Loudermill,* 470 U. S. 532, 546 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), for the rule that petitioner is not entitled a pre-suspension hearing before a 120-days emergency suspension. Apparently, the lower courts interpret the *Loudermill case* to mean that a civil servant is not entitled an elaborate pre-termination hearing before the deprivation of the civil servant's property is taken.

The *Loudermill case* is distinguishable from petitioner's case. In that, the issue in the *Loudermill case* was whether the civil servant was entitled to a pre-termination hearing before the deprivation of his employment property right was taken. In petitioner's case, the issue is whether a civil servant is entitled to a pre-suspension hearing before the government implements an immediate 120-day suspension without pay. The other issue is when is it appropriate to implement a 120-day emergency suspension without pay on a civil servant with a property right of employment.

Nevertheless, this honorable court in *Loudermill* held that an essential principle of due process is that a deprivation of life, liberty or property "be preceded by a hearing before a citizen is deprived of any significant property interest." This principle requires "some kind of a hearing" before the deprivation.

In this particular instance, the petitioner established he was a permanent classified civil servant. Therefore, petitioner has a property interest of his employment and due process applied. On May 10, 1999, respondents initiated an immediate and emergency suspension against petitioner for 120-days without pay, suspended his detail privileges, arrested and incarcerated appellant. As stated in the *Fuentes case,* the opportunity to a hearing is to try to prevent the deprivation from happening. Therefore, before the suspension and the taking of his property(regular,

overtime and detail pay, and benefits), petitioner should have been afforded notice and opportunity to be heard. Respondents violated petitioner's due process right by initiating an immediate emergency suspension without notice or a hearing, and in turn, defendants violated 42 U.S.C. Section 1983.[13]

In *Loudermill,* Justices Marshall and Brennan dissented in part and wrote a separate opinion stating that he reaffirm his belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents sought in this case. The dissent goes on to say that before the decision is made to terminate an employee's wages, the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence. [548 -549] The dissent goes on to say that the disruption caused by a loss of wages may be so devastating to an employee that whenever there are substantial disputes about the evidence, additional pre-deprivation procedures are necessary to minimize the risk of an erroneous termination deprivation. Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments.

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13. 42 U.S.C. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..

This harm would be irreparable. In this situation, petitioner had to declare bankruptcy.

Appellant clearly stated this violation in his complaint. In addition, appellees had a policy, custom and scheme to violate New Orleans Police Officers' due process rights in the same manner as they did plaintiff. The New Orleans Police Department has a policy and custom of suspending Black Police Officers without notice and an opportunity to be heard in violation of the 5th and 14th amendments of the U.S. Constitution. The New Orleans Police Department gave an immediate emergency suspension without pay and without procedural due process to the following officers: Darryl Coulon, Darryl Dean, George Lee III, and Donald Brooks. The New Orleans Police Department allowed several White Officers to continue working when a criminal charge was pending. Petitioner argued that respondents discriminated against him by allowing White Officers administrative leave or desk duty.

The lower courts cited the Loudermill case to say that "we have stated that due process is satisfied when the employee receives "oral or written" notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

The closest case on point with petitioner's case is *Gilbert v. Homar,* 520 U. S. 924, 117 S. Ct. 1807, 138 L. Ed 2d 120, (1997). In *the Gilbert v. Homar case,* this honorable court ruled that the government violated due process by failing to provide a sufficiently prompt post-suspension hearing and remanded this issue for consideration to the Court of Appeals. Mr. Homar was a campus police officer who was suspended pending criminal charges. The charges were dropped and prompt post-suspension hearing

was done.

In this particular instance, the U. S. 5th Circuit Court of Appeals failed to cite the *Gilbert case.* In petitioner's case, on May 11, 1999, petitioner appealed that suspension with the civil service commission. However, the hearing was not conducted until May 9, 2000. Thus, petitioner's due process was violated because of the failure to provide a sufficiently prompt post-suspension hearing. ***Thus, petitioner's case is and was not frivolous.***

With respect to pre-suspension hearings, in *Gilbert case*, this Honorable Court remanded the U. S. 3rd Circuit Court of Appeals ruling that a pre-suspension hearing without pay is sufficient so long as the suspended employee receives a sufficiently prompt post-suspension hearing. The court when on to say that the lost of income is relatively insubstantial because in *Gilbert* there was a quick post-suspension hearing-unlike petitioner's case. This Court by parity with the reason in the *Loudermill case,* concluded that a pre-deprivation hearing would assure that there are reasonable grounds to support the suspension without pay, but because the indictment by a grand jury, they were assured that the grounds for the suspension was supported. In essence, this Court rule that since Mr. Homar was indictment of by a grand jury there was probable cause, and this was assurance enough that the suspension was justified.

The *Gilbert case* is distinguishable from petitioner's case, in that, Mr. Macklin was indicted by a bill of information and not by a grand jury. Mr. Macklin was suspended for 120-days without pay, and the administrative/civil service hearing took place one year after the suspension and about 90 days after the termination. According to the *Gilbert case,* due process is violated, if there is no prompt post-suspension hearing. See: *Schaper v. City of Huntsville,* 813 F. 2d 709 (5th Cir. 1987).

In petitioner's case, there was no prompt-post suspension administrative civil service hearing. Therefore, petitioner's due process rights were violated. Petitioner was entitled to damages as pursuant to 42 U. S. C. Section 1983, for respondents violating his due process. This suggests that a pre-suspension hearing is in order.

Furthermore, the way in which the 120-day suspension without pay is implemented seems suspect. Petitioner asserts that the New Orleans Police Department allowed several White Officers desk duty with pay pending the outcome of the criminal charges. Treating someone differently gives rise to an inference of discrimination and/or retaliation. Moreover, in petitioner's case, there was no emergency. Petitioner was defending himself, while off duty, from a paranoid schizophrenic person who was the aggressor. If the petitioner would have had a pre-deprivation hearing to cross examine his accuser, the accuser could not give sufficient testimony. In petitioner's case, the evidence was insufficient and unreasonable to assure that the grounds for suspension were justifiable.

Finally, petitioner asserts that in Louisiana, he is entitled to a full-blown pre-suspension and pre-termination hearing because Article 1 of the Louisiana Constitution establishes certain guaranties and protections for individual rights and liberties. . ., **the citizens of Louisiana have chosen a higher standard of individual liberty than that afforded by the Constitution of the United States of America**. . ." The will of the people of Louisiana suggests that the individual's liberty and property interest is higher in Louisiana than in any other State of the Union. Article 1 Section 2 of the Louisiana Constitution provides that no person. . . shall be deprive of life, liberty, or property, except for due process of law. . . With this intent, petitioner asserts that a more liberal approach should be implemented, in that, a pre- deprivation, pre-suspension hearing, pre-termination hearing, and "name clearing hearing" should

encompass a full-blown hearing to confront and cross examine his accusers.

II. The lower court decision affirmed by the Court of Appeals denying petitioner's motion for summary judgment and granting respondents motion for summary judgment was irregular and inconsistent with Rule 56 of the Federal Rules of Procedure and local rules.

A. When defendants failed to oppose plaintiff's motion for summary judgment on two occasions, should the lower court have ruled in favor of the plaintiff and granted plaintiff's motion for summary judgment?

Rule 56 of the Federal Rules of Civil Procedure[15] provides that if there are no genuine issue of material fact, the movant is entitled to summary judgment as a matter of law. According to Local Rule 2:10e of the United States Rules for the Eastern District[16], all material facts set forth in the statement required to be service by the moving party will be deemed admitted, for the purpose of the motion, unless controverted as required by this rule.

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14. Federal Rules of Civil Procedure 56 provides that:

> (c) "Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with the **affidavits**,if any, show that there is **no** genuine issue as to **any** material fact and that the moving party is entitled to judgment as a matter of law."
> (e)"When a motion for summary judgment is made and supported as provided in this section rule, an adverse party may not rest upon the mere allegation or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. **If he does not so respond, summary judgment, if appropriate, shall be entered against him**."

In this particular case, respondents failed to submit a witness and exhibit list as per the Court order. According to the Court order, respondents could not introduce into the record any witnesses or exhibits. On March 27, 2001, the Court stated that "with respect to the request for admission of facts, defense counsel is ordered to answer said request within 7-days of this date or the request for admission of facts will be deemed to be admitted. Petitioner failed to answer appellant's request for admission of facts. On April 11, 2001, petitioner filed a motion for summary judgment. Respondents were required to respond to appellant's motion for summary judgment by May 2, 2001. Petitioner requested an expedited hearing because the respondents failed to answer appellant's request for admission of facts **as per the court order.** Petitioner filed a motion requesting that respondents' exhibits and witnesses be excluded. At this juncture, the appellant had a check mate, in that, appellees failed to submit a witness and exhibit list (so any witness or evidence should have been excluded), failed to answer Macklin's request for admissions of facts, and failed to answer Macklin's motion for summary judgment. There was no need for a trial. Judgment should have been rendered in favor of Appellant.

However, on April 30, 2001, the Court continued petitioner's motion for summary judgment scheduled for May 2, 2001, to June 13, 2001. The court order that respondents' opposition to appellant's motion must be filed

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15. Local Rule 2.10E of the Uniform Local Rules of United States District Court for Louisiana requires that:

> A party opposing a motion for summary judgment shall file a separate, shore concise statement of material facts as to which there exist a genuine issue to be tried. All material facts set forth in the statement required to be service by the moving party will be deemed admitted, for the purpose of the motion, unless controverted as required by this rule.

no later than 5:00 p.m. on June 5, 2001. Again, respondents failed to file its opposition to Macklin's motion for summary judgment . With respect to petitioner's motion for summary judgment, respondents did not set forth specific facts showing that there was a genuine issue for trial. Petitioner's motion for summary judgment went unopposed. The Court breached its duty by failing to apply Rule 56 of the Federal Rules of Procedure and by failing to apply Local Rule 2:10e of the United States Rules for the Eastern District. The Judge of the Lower Court violated petitioner equal protection of the law by failing to equally apply Rule 56 and Local Rule 2:10e against appellees. The judge of the lower court applied the procedural rules **inconsistently with the principles of right and justice and arbitrarily discriminated against appellant. Thus, the judgment is improper and the judgment should be reversed. A judgment should have been rule in favor of appellant.**

According to, *Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct 2607, 96 L.Ed.2d 557 (1987), The U. S. Supreme Court held that the District Court has the discretion to adopt local rules that "are necessary to carry out the conduct of its business," **so long as the local rule is consistent with the Federal Rules of Civil Procedure.** The Supreme Court concluded that if the District court uses a local rule inconsistently with the principles of right and justice and arbitrarily discriminates against a party, the action should be reverse, vacated and remanded.

In this particular instance, on at least three occasions, the Lower Court used the local rules and Rule 56 inconsistently with the principles of right and justice and arbitrarily discriminated against petitioner.

B. The lower court violated appellant equal protection of the law by applying rule 56 and local rule 2.10e unfairly and discriminated against appellant.

The only case that comes close to this issue *Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct 2607, 96 L. Ed.2d 557 (1987).

This is a novel approach to the problem applying the rules of procedure arbitrarily. Petitioner cities Article 1, Section 3 of the Louisiana Constitution as primary source of law for the rule that no person shall be denied the equal protection of the law. Petitioner cites the 14th Amendment of the U. S. Constitution which provide that no person shall be denied equal protection of the law. The equal protection clause is triggered when the government treats someone differently than another who is similarly situated and will apply to intentional or purposeful discrimination against an individual that is not rationally related to the governments objective. (See: *Buckley Construction v. Shawnee Civil & Cultural Development*, 933, F. 2d 853 (10th Cir. 1991).

In this particular instance, it was highly irregular to allow respondents to introduce exhibit when it order stated that the court will not allow exhibit if the list has not been filed by the deadline. It was highly irregular to deny petitioner's unopposed motion for summary judgment.

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16. 14th Amendment of the U. S. Constitution provides that:

> All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizen of the United States and of the State wherein they reside. No State shall . . . shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to anyone within its jurisdiction the equal protection of the law.

17. Article 1, Section 3 of the Louisiana Constitution provides:
No person shall be denied the equal protection of the law. . .

The lower court was unfair in dismissing petitioner's case because petitioner's motion for summary judgment should have been granted two months before appellees' motion for summary judgment was heard. The lower court treated petitioner differently, bent over backward to accommodate the respondents and unfairly discriminate against the petitoner by continuing petitioner's motion for summary twice without any motion to continue. Instead of the court abiding by Rule 56 and local rule 2.10 e, on June 8, 2001, the lower court unfairly continued appellant's motion for summary judgment to September 5, 2001. Again, the Lower Court applied the rules **inconsistently with the principles of right and justice and arbitrarily discriminates against appellant.**

Ironically and unbelievable, on July 10, 2001, the Lower Court allowed respondents to file its motion for summary judgment, and August 3, 2001, the Lower Court granted appellees' motion for summary judgment . Again, the Lower Court applied the rules **inconsistently with the principles of right and justice and arbitrarily discriminates against appellant.** Apparently the Court wanted to hear respondent's motion for summary judgment first, and rule against appellant. The Lower court was unfair and discriminatory on its face regarding procedure by not applying the local rule and Rule 56 equally. The District Court harshly applied the local rule against Petitioner . Petitioner. cites, for the proposition that granting summary judgment by harshly and inconsistently applying the local rule in violation of Rule 56 is a severe sanction and an abuse of discretion.[18] [19] The Court in **Meade**

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18. *Hancock v. City of Oklahoma*, 857 F. 2d 1394 (10th Cir. 1988)

19. *Mead v. Grubbs*, 841 F. 2d 1512 (10th Cir. 1988)

concluded that the District Court abused its discretion in using the ultimate weapon, i.e. disposing with finality, plaintiff's job discrimination claim, such in the court's view, is overkill. 841 F.2d at 1117.

Furthermore, the court stated that its ruling was from cross motions for summary judgment . This is incorrect. On the contrary, the lower court allowed the respondents two months to file its motion for summary judgment. The court went against its own pretrial order in allowing the respondents to file exhibits attached to their motion for summary judgment. The court order stated that if the party does not file a witness and exhibit list before the cut off date, then the party will not be allowed to file exhibits into the record. Any deviation from the normal procedure or policy give rise to an inference of discrimination.[20] Nevertheless, appellant's motion for summary judgment should have been granted. The lower court violated the Equal Protection Clause as well.

This Honorable Court should overturn the lower court's ruling and grant appellant's motion for summary judgment and damages as prayed for, or in the alternative, reverse and remanded the case.

III.. **The decision below conflicts with prior decision regarding Rule 38 of the Federal Rules of Appellate Procedure because Petitioners appeals regarding due process is totally *with* merit.**

In order to impose sanctions under Rule 38, the U. S. Court of Appeals must make two determinations. First, the Court of Appeals must find that the appeal *as a whole* is in fact totally frivolous. Second, the 5th Circuit must

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19. *Walker v. Pettit Construction Corp.*, 605 F. 2d 128 94th Cir. 1979)

determine if sanction are appropriate in the case. [21, 22]

In *Securities and Exchange Commission case,* this Honorable Court stated that it liberally construes briefs and that it discern but two challenges whether the appeal is in fact totally frivolous and whether sanctions are appropriate. According to *McCoy v. Court of Appeals of Wisconsin,* and *Anders v. California,* the U. S. Supreme Court states that if counsel finds his case to be wholly frivolous, he should advise the court and request permission to withdraw. The case law suggests that the word "Frivolous" within the context of a Rule 38 sanction means totally and wholly without merit. *Coghlan v. Starkey,* 852 F. 2d 806 (5th Cir. 1988). In *George v. Texas,* 788 F.2d 1099 (5th Cir.) cert denied, 479 U. S. 866 (1986), this Court stated that though novel constitutional theories should not be chilled, . . . this court has no desire to deter any litigant

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21. Rule 38 of the Federal Rules of Appellate Procedure provides:
> If a court of appeals determines that an appeal is frivolous, it may after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double cost to the appellee.

22. Securities and Exchange Commission v. Recile , 10 Fd 2d 1093 (5th Cir. 1993)

23. *May v. Chicago Paper Handlers' & Electrotypers' Local No. 2, AFL CIO,* 865 Fd. 2d 134 (7th Cir. 1989)

24. *McCoy v. Court of Appeals of Wisconsin,* 486 U. S. 429, 100 L. Ed 2d 440, 108 S. Ct 1895 (1988),

25. *Anders v. California,* 386 U. S. 738, 87 S. Ct 1396, 18 L. Ed 2d 493(1967)

26. *Coghlan v. Starkey,* 852 F. 2d 806 (5th Cir. 1988),

27. *George v. Texas,* 788 F. 2d 1099(5th Cir) cert denied 479 U. S. 866 (1986).

from advancing any claim or defense which is arguably supported by existing law, or any reasonably based suggestion for its extension, modification, or reversal. Positions thus taken cannot be considered as frivolous, although they may be unsuccessful and indeed may be given short shrift, but may not be totally and wholly without merit.

Petitioner stated that his due process was violated by giving him a 120-day immediate suspension without pay, with the opportunity to work detail job and without a prompt post-suspension hearing. Petitioner asserts that the post-suspension hearing was held one year later. According *Gilbert v. Homar,* 520 U. S. 924, 117 S. Ct. 1807, 138 L. Ed 2d 120, (1997), this honorable court ruled that the government violated due process by failing to provide a sufficiently prompt post-suspension hearing and remand this issue for consideration by the Court of Appeals. Therefore, petitioner's case or appeal were not totally without merit. Petitioner's due process was violated. Thus, the argument is totally with merit.

This court should not deter or chill any litigant from advancing any claim (whether it be novel constitutional theories or not) which is arguably supported by existing law or any bases for its modification or reversal. Macklin states that his claims and case has and had merit. Macklin alleged that they suspended and terminated him for protecting and serving the citizens of the City of New Orleans Macklin was on the front line and was placed in a position to defend himself and to protect the patrons and clerks at the Shell Gas Station. A crazy person provoked an altercation in which Macklin responded. If Macklin would not have responded, he would have been disciplined for being a coward.

IV. CONCLUSION

The United States District Court's decision affirmed by the Fifth Circuit Court of Appeals holding that a civil servant/public employee does not have a due process right to a pre-suspension hearing to be allowed to confront and cross examine his accusers is manifest and reversible error. According *Gilbert v. Homar,* 520 U. S. 924, 117 S. Ct. 1807, 138 L. Ed 2d 120, (1997), this honorable court ruled that the government violated due process by failing to provide a sufficiently prompt post-suspension hearing and remand this issue for consideration by the Court of Appeals. Again, in petitioner's case, petitioner was given a 120-day suspension, without pay, and without a prompt post-suspension hearing. Therefore, petitioner's due process was violated. The U.S. District Court's decision affirmed by the Fifth Circuit U.S. Court of Appeals allowing summary judgment in due process violation cases and discrimination cases is reversible as well. The Courts are drifting into clear and present danger when it not only allows the government to violate a U.S. citizens constitutional rights to due process to not have a pre-suspension hearing, but also court is violating a U. S. citizens right to trial and trial by jury through summary judgment proceedings. The lower courts decision conflicts with the decision of this Honorable Court regarding summary judgments in connection with discrimination. According to Adickes v. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed. 142 (1970), this Court ruled against summary judgment regarding discrimination and revealed the importance of the trial by jury. Justice Black's in a concurring opinion, stated that the right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision--jury trial in Civil cases. Justice Black goes on to say **"the advantages of trial before**

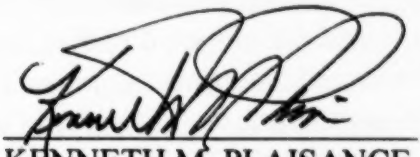
a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment."

It is difficult to effectuate and vindicate the 1964 Civil Right Act when the system is geared towards failure, frustration, and difficulty in financing the litigation. The agency that was designed to assist-- hinders the process by delaying the investigation. In addition, the courts place a heavy burden on plaintiff's to prove his or her case in court proceedings, and make it difficult to try the case before a jury. It must be conceded that irregular procedure and policy gives rise to discriminatory intent. In this particular instance, the U.S. District Court for the Eastern District of Louisiana was highly irregular to deny petitioner's unopposed motion for summary judgment. It highly irregular to deny petitioner's motion for summary judgment and grant defendant's motion for summary judgment. Logic does not flow from the decision because if one denies a motion for summary because there are disputed facts, then it is improper and unconscionable to grant a motion from summary judgment on the same set of laws and facts. It is irregular to allow respondents two continuance of plaintiff's motion for summary judgment with respondents moving the court. It was highly irregular to allow respondents to introduce exhibit when it order stated that the court will not allow exhibit if the list has not been filed by the deadline. It is irregular to apply the local rules in contravention to the Federal Rules. The reasons for the decision gives credence to the assertion that many Americans have-- that is, the courts are not to be trusted because they are maintaining the status quo and allowing discrimination to continue. How can the judiciary expect America to respect the law and constitution when the courts are not respecting the individual rights of the constitution. America is in an unhealthy state of denial.

Clearly, it is the legislative's intent to provide equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, because of discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions, the foundations of a free democratic state, and threatens the peace, order, health, safety, and general welfare of the state and its inhabitants. Turner v. City Monroe, 634 So.2d 981 (La. App. 2 Cir. 1994).

Petitioner has established by direct and indirect evidence that defendant violated his due process and discriminated against him as well. Petitioner has established that his case is totally with merit. Petitioner prays that this Honorable Court grants the petition for writ of certiorari and prays that the lower courts' decisions be reversed and remanded.

Respectfully submitted,



KENNETH M. PLAISANCE
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Louisiana Bar Number 19738

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this 29th day of August, 2002, forty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States of America, Washington D.C. I certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the person(s) identified below by depositing the same in the United States mail at New Orleans, Louisiana, first class, postage prepaid, and properly addressed to

Attorney for defendant/respondent
George Wallace,
New Orleans City Attorneys Office
1300 Perdido Street
Fifth Floor
New Orleans, Louisiana 70112

KENNETH M. PLAISANCE

APPENDIX

1. Court of Appeal Decision, May 31, 2002

2. Trial Court Judgment, November26, 2002.

APPENDIX A- AFFIRMATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Filed May 31, 2002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT COURT OF APPEAL

No. 01-31039

ALBERT MACKLIN ,

Plaintiff-Appellant,

versus

CITY OF NEW ORLEANS, ETC; ET. AL,

Defendant-Appellee.

Appeal from the United States District Court
for the Easter District of Louisiana

Before DAVIS, BENAVIDES, AND CLEMENT , Circuit Judges.

PER CURIAM:

In this civil rights case, a dismissed police officer appeals the district court's entry of summary judgment against him. For the reasons that follow, we affirm the judgment of district court and order appellant and his counsel to show cause why they should not be sanctioned for making a frivolous arguments on appeal.

Appellant Albert Macklin ("Macklin") served as a police officer in the New Orleans Police Department (the Department) until his dismissal from the force after a January (sic July) 28, 2998, off duty incident in which he struck a

man over the head with his police baton. Although at the time of the incident Macklin was suspension for a separate violation, he was wearing a police badge, had a police radio, and was at a gas station where he routinely worked a police detail. Macklin failed to seek medical treatment for the victim and also failed to report the incident to his supervisors. On May 6, 1999, he was arrested for aggravated battery, and on May 10, 1999, the Department suspended him for 180 days. An internal investigation by the Department's Public Integrity Division found that Macklin was the aggressor in the incident and was repeatedly untruthful to investigators. It further determined that Macklin had not offered any mitigating evidence at a disciplinary hearing. Macklin was therefore dismissed from the police force on February 18, 2000, He was given the right to appeal his termination to the Civil Service Commission (the Commission"). The Commission held two hearings on Macklin's appeal, at whice he was represented by counsel. After reviewing the evidence, the Commission upheld Macklin's dismissal.

After he was acquitted on the criminal charge, Macklin filed suit against appellees the City of New Orleans (the City"), Police Chief Richard Pennington, and Mayor Marc Morial. He alleged claims of employment discrimination, false arrest, and violations of his constitutional rights. Only July 10, 2001, the City filed a motion for summary judgment. Macklin, who had filed his own motion for summary judgment months earlier, failed to respond to the city's motion. Therefore, on August 3, 2001, the district court in a minute entry granted summary judgment in favor of the city pursuant to Local Rule 7.5 E, which requires the filing of an opposition no later than eight day prior to the hearing scheduled for the motion.

Macklin filed a notice of appeal from that minute entry on August 27, 2001. Although, Macklin stated in his notice of appeal that "the Court has dismiss with finality

plaintiff's entire case," only the claims against the City had been dismissed in the August 3, 2001, order. The district court then fixed this omission by issuing a minute entry on September 5, 2001, stating that its previous order "should have included a dismissal as to the plaintiff's claims against defendants Richard Pennington and Marc Morial. In this second order, the district court indicated that Macklin would have fifteen days to file a motion for reconsideration.

On Macklin's motion for reconsideration, the district court reset its hearing on both Macklin's and the defendants' motion for summary judgment. On November 20, 2001, the district court granted the defendants' motion for summary judgment. On November 21, 2001, the district Court granted defendants' motion and denied Macklin's motion. Six days later, on November 26, 2001, the district court entered judgment in favor of defendants. Macklin filed his second notice to appeal on November 29, 2001, again stating that " the Court has dismiss plaintiff's entire case.

II

Macklin challenges the district court's grant of summary judgment, which we review de novo. See: *Mason v. United Air Lines, Inc.* 274 Fd. 3d 314, 316 (5th Circuit 2001). Specifically, Macklin complains that (1) the district

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1. It is clear that Macklin first notice of appeal was premature, as the original summary judgment did not includes all defendants and Macklin failed to obtain certification pursuant to Fed. R. Civ. P. 54(b). Because Macklin filed a second, timely notice of appeal from the district court's final summary judgment order, we need not address the question of whether the doctrine of cumulative finality preserves our jurisdiction over the appeal despite the prematurity of the original notice of appeal. *Compare Jetco Elec. Indus. v. Gardiner,* 473 F. 2d 1228 (5th Cir. 1973) (holding that jurisdiction exists despite premature notice of appeal from order not listing all parties where subsequent

order did name parties, and orders, taken together, amounted to final disposition of claims) with *United States v. Cooper,* 135 F. 3d 960, 963(5th Cir. 1998) (stating that Supreme Court decision in *FirTier Mortgage Co. v. Investors Mortgage Co.,* 498 U. S. 269 (1991) abrogated reasoning of Jetco.) court's application of its local rules violated "principles of right and justice" as well as Macklin's right to equal protection, (2) the district court erred in granting summary judgment against him, and in doing so, circumvented Macklin's right to trial by jury, and (3) the district court erroneously rejected Macklin's equal protection and due process claims. We address these issues in turn.

A.

First, Macklin contends that the district court's application of its local rules was "inconsistent{} with the principles of right and justice and arbitrary discriminated against him. In particular, he complains that the district court discriminated against him when it extended filing deadlines that the City was unable to meet. We review the district court's administrative handling of a case, including its enforcement of the local rules and its own scheduling orders for abuse of discretion. See: *Rushing v. Kansas City S. Ry. Co.* 185 F.3d. 496, 509 (5th Cir. 1999). The City explained that at the time of the filing dates in question, it was experiencing a large staff turnover and was having difficulty meeting court deadlines. In light of these circumstances, it was within the discretion of the district court to extend some filing deadlines. As there is no indication that the district court exercised leniency unfairly or otherwise improperly prejudiced Macklin, we find no discretion.

Macklin also argues that the district court's application of Fed. R. Civ. P. 56 and its local rules violated his right to equal protection and that Rule 56 facially violates equal protection. This argument need not detain us long.

His candid, if inartfully phrased, admission that "after extensive research of case law for decisions setting the equal protection requirement for district court to apply the rules equally, but have found few cases on point" suggests the weakness of his claim. The only "discriminatory treatment he identifies is the district court's decision to grant the City two continuances on its response to Macklin's summary judgment motion. He does not even assert that such an option was denied to him when he was filing a response to the City's motion for summary judgment. Moreover, he provides no explanation of how Rule 56 is discriminatory on its face.

Macklin further contends that the district court erred by granting summary judgment against him, and by doing so circumvented his right to a jury trial. Macklin fails, however, to identify a single issue of fact, relying instead on the vague assertion that the evidence is such that a reasonable jury could return a verdict in favor of the appellant." In this case, the district court issued an opinion explaining its reasons for granting summary judgment. Rather than attacking the district court's reasoning and support his points with record citations and relevant authority, Macklin has chosen to merely conclusorily state that the district court erred. As this court has noted before, such an effort "is the same as if he had not appealed" the judgment at all. *Brinkmann v. Dallas County Deputy Sheriff Abner,* 813 F. 2d 744, 748 (5th Cir. 1987). Morever, his argument that "there is truly a conflict of law between a constitutional right to have trial by jury and the disposing of discrimination case (sic) through summary judgment proceedings" is pattently frivolous. See *Plaisance v. Phelps,* 845 F. 2d 107, 108 (5th Cir. 1988).

C.

Macklin finally contends that his due process interest in property and liberty were violated by the absence of a pre-suspension hearing and denial of a name clearing hearing.

Regarding Macklin's suspension without pay, we have stated that due process is satisfied when the employee receives "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Schaper v. City of Huntsville*, 813 F. 2d 709, 714 (5th Cir. 1987) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U. S. 532, 546 (1985). Macklin was given multiple opportunities to rebut the charges against him, and was represented by counsel during this stage of the administrative process. In light of these protections. We find no violation of due process. Furthermore, as the district court correctly found, Macklin cannot avoid summary judgment on his claim for denial of a name clearing hearing because he offered no evidence that he ever requested such a hearing. See: *Rosenstein v. City of Dallas*, 875 F. 2d 392, 396 (5th Cir. 1989) . (Noting requirement that employee must request a name clearing hearing)

III

Having reviewed the record and the briefs, we conclude that the district court did not err in granting summary judgment against Macklin. Moreover, we are left with the inescapable impression that Macklin's argument on appeal were so totally without merit and his briefing so sloppily prepared that sanctions may be warranted in this case. To this end, we order that Macklin and his counsel show cause why they should not be sanctioned under Fed. R. App. P 38, our inherent power, or any other source of application law for making frivolous arguments on appeal. Their joint statement articulating their reasons for avoiding sanction shall be filed no later than 15 days after the filing of this opinion and shall not exceed 30 pages.

For the foregoing reasons, we AFFIRM the judgment of the district court and ORDER Macklin and his counsel to SHOW CAUSE why sanctions should not be imposed for frivolous appeal.

APPENDIX B–MANDATE FROM DISTRICT COURT FOR THE EASTERN DISTRICT COURT OF LOUISIANA

ISSUED ON : NOVEMBER 26, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT MACKLIN ,	CIVIL ACTION
vs.	00-1398
CITY OF NEW ORLEANS	SECTION F

JUDGMENT

For the written reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Harry Connick, Marc Morial, The City of New Orleans, Richard Pennington and Ronal Serpas and against plaintiff, Albert Macklin, dismissing plaintiff's suit.

New Orleans, Louisiana, this 26th day of November, 2001.

MARTIN FELDMANN

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED

02 741 AUG 29 2002

OFFICE OF THE CLERK

OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 2002

ALBERT MACKLIN,

Petitioner,

v.

THE CITY OF NEW ORLEANS, POLICE CHIEF, RICHARD PENNINGTON, MAYOR, MARC MORIAL, DEPUTY POLICE, CHIEF RONALD SERPAS AND NEW ORLEANS DISTRICT ATTORNEY HARRY CONNICK.

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO THE WRIT OF CERTIORARI

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APPENDIX B–MANDATE FROM DISTRICT COURT FOR THE EASTERN DISTRICT COURT OF LOUISIANA

ISSUED ON : NOVEMBER 26, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT MACKLIN ,	CIVIL ACTION
vs.	00-1398
CITY OF NEW ORLEANS	SECTION F

JUDGMENT

For the written reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Harry Connick, Marc Morial, The City of New Orleans, Richard Pennington and Ronal Serpas and against plaintiff, Albert Macklin, dismissing plaintiff's suit.

New Orleans, Louisiana, this 26th day of November, 2001.

MARTIN FELDMANN

UNITED STATES DISTRICT JUDGE

APPENDIX B–ORDER AND REASON FROM DISTRICT COURT FOR THE EASTERN DISTRICT COURT OF LOUISIANA

ISSUED ON: November 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT MACKLIN ,	CIVIL ACTION
vs.	00-1398
CITY OF NEW ORLEANS	SECTION F

ORDER AND REASONS

Before the Court are cross-motions for summary judgment. For the reasons that follow, the defendants' motion is GRANTED and plaintiff's motion is DENIED.

I. Background

This civil rights lawsuit was filed by plaintiff, a former New Orleans Police Officer, against the City of New Orleans, and his fellow officers. The plaintiff, Albert Macklin, alleges that he was wrongfully arrested, unduly disciplined and discriminated by the defendants.

Macklin was first hired by the City of New Orleans on March 19, 1974, as a Correctional Officer. He held that position until February 18, 2000, when he was terminated for violating departmental rules and procedures. His termination was a result of an incident on July 25, 1998, when he was involved in a fight with Len Holmes. Macklin struck Holmes several times in the head with a police baton. Macklin did not seek medical treatment for Holmes and he allowed Holmes to leave the scene without notifying anyone. Macklin also failed to report the incident to his supervisor.

After an internal investigation was conducted by the

Public Integrity Division, it was determined that Macklin used unauthorized and excessive force against Holmes and that he neglected his duty in failing to notify a supervisor or complete an incident report. On May 9, and May 25, 2000, the Civil Service Commission held hearings and determined the Macklin's actions warranted termination from the police department.

II. Cross-Motions for Summary Judgement

This case is before the Court of cross-motions for summary judgment. The defendants move to dismiss Macklin's claims on summary judgment, while Macklin seeks summary judgment in his favor on his claims against the defendants.

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio, 477 U. S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i] f the evidence is merely colorable, or is not significantly probative," summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. See Celotex Corp. v. Catrett, 477 U. S. 317, 322-23 (1986). In this regard, the non-moving party msut do more than simply deny the allegations raised by the moving party. See Donaghey v. Ocean Drilling & Exploration Co., 974 F. 2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affividavits or depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Martin v. John W.

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1. At time of the incident, Macklin was off duty and on suspension

Stone Oil Distrib., Inc., 819 F. 2d 547, 549 (5th Cir. 1997). Final, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. Anderson, 477 U. S. at 255.

a. Title VII Claims

The plaintiff first asserts claims of discriminatory administration of discipline and discriminatory failure to promote under Title VII of the Civil Rights Act of 1964. The Fifth Circuit has held that the filing of an administrative complaint is a jurisdictional prerequisite to a Title VII action. Dollis v. Rubin, 77 F. 3d 777, 781 (5th Cir. 1995). Prior to filing a judicial complaint, a plaintiff must exhaust his administrative remedies. Johnson v. Bergland, 614 F.2d 415, 417 (5th Cir. 1980); Barnes v. Levitt, 118 F. 3d 404 (5th Cir. 1997). A plaintiff must file an Equal Employment Opportunity Commission complaint and receive a "right to sue" letter. See Honea v. Sqs Control Services, Inc., 859 F. Supp 1025, 1029 (E. D. Tx. 1994). Macklin never filed a complaint with the EEOC or raised these claims in his Civil Service Commission hearing or in his appeal to the Louisiana Fourth Circuit Court of Appeal. Because the plaintiff failed to exhaust his administrative remedies with respect to these claims, the Court grants summary judgment.

b. Due Process Claims

The plaintiff also asserts that the defendants violated his due process rights by not providing adequate notice of thie allegations against him and for not informing him tha this conduct could result in disciplinary aciton, and therefore, plaintiff did not have an opportunity to respond. The Court also grants summary judgment on this claims.

Procedural due process entitles a public employee with a property right in his employment to notice of the charges against him, an explanation of the employer's evidence, and also an opportunity tho present his side of the story. Cleveland Bd. Of Education v. Loudermill, 470 U.S.

532, 546 105 S.Ct. 1487, 1495, 84 L. Ed 2d 494 (1985); Delahoussaye v. New Iberia, 937 F. 2d 144, 151 (5th Cir. 1991). To establish a denial of due process, a plaintiff must show that before termination he did not receive written notice of the reasons for termination and an effctive opportunity to rebut those reasons. See Thurston v. Dekle, 531 F.2d 1264 (1273) (5th Cir 1976) vacated on other grounds, 438 U. S. 901, 98 S. Ct. 3118, 57 L. Ed. 2d 114(1978). " Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." Id..

Although the state must accord a public employee "some kind of hearing" before termination, this may consist of no more than a meeting at which the employer states the grounds for dismissal and gives the employee an opportunity for rebuttal. See Cleveland Bd. Of Education v. Loudermill, 470 U. S. at 546, 105 S. Ct. at 1495.

The Court finds that Macklin was given adequate notice and an opportunity to address whether his conduct could have an adverse impact on his employment at the post-discipline hearing before a hearing examiner designated by the Civil Service Commission. Macklin was also afforded a subsequent appeal before the Civil Service Commission panel. In addition, the Court notes that Macklin was represented by counsel at both the hearing and the appeal. Because, the Court finds that these proceedings were sufficient under Cleveland Bd. Of Education v. Loudermill, the plaintiff's due process claim is also denied.

c. False Arrest Claims

Next, the plaintiff asserts that he was wrongfully arrested by the defendants after the incident with Holmes. The defendants respond that they are entitled to qualified immunity.

Qualified immunity shields government officials from civil damages if their conduct does not violate clearly

estiblished statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 547 U. S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Oualified immunity is meant to give government officials a right now merely to avoid standing trial, but also to avoid such pretrial matters as discovery, because such inquiries can be peculiarly disruptive to effective government. Behrens v. Pelletier, 516 U. S. 299, 308, 116 S. Ct. 834, 839, 133 L. Ed 2d 733 (1996). That is, qualified immunity provides immunity from suit, not simply immunity form liability. Forster v. City of Lake Johnson, 47 F. 3d 1427, 1432 (5th Cir. 1995).

The qualified immunity analysis involves a two-step process. First, a court examines whether the plaintiff has alleged a violation of a clearly established constitutional right. Shipp v. McMahon, 234 F. 3d 907, 911 (5th Cir. 2000). If the plaintif has done so, the next step is to detemine whether the official's conduct was objectively reasonable at time of the incident. Id. At 912. Objective reasonableness is a matter of law for the courts to decide. Mangieri v. Clifton, 29 F.3d 1012, 1016, (5th Cir. 1994).

An individual has a federally protected right to be free from unlawful and detention resulting in a significan restraint of liberty and violation of this right can be grounds for a suit under Section 1983. See Dennis v. Warren, 779 F. 2d 245, 247. (5th Cir. 1985). Thus, the issue is whether the arresting officers acted reasonably under the circumstances. The Court finds that they did. The officers arrest Macklin after a charge by someone who had been injured by Macklin. Macklin didn't report the incident, but later admitted that an incident occurred. Under the circumstances and with the information that was provided to them, the arresting officers acted in an objectively reasonable manner when they determined that there was probable cause to arrest Macklin. See Thomas v. Kipperman, 846 F. 2d 1009, 1011 (5th Cir. 1988) (qualified immunity protects government officials from a charge of wrongful arrest where a reasonable official would believe probable cuase was present.)

d. Denial of Name-Clearing Hearing

Macklin also asserts that he was defamed by the defendants when they communicated the reason for his dismissal throughout the police department. He says he never had the opportunity to clear his name of the false charges.

Even absent a constitutionally protected property interst, a government employee may have a liberty interest in freedom from stigmatization. Well v. Doland, 711 F. 2d 670, (5th Cir. 1983. A discharge from public employment under circumstances that put the employee's reputation, honor, or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment. Rosenstein v. City of Dallas, 876 F. 2d 392, 395 (5th Cir. 1989). Although for due process purposes, such an individual is not entitled to actual review of the decision to discharge him, the individual is entitled to a hearing providing a public forum or opportunity to clear his name. Id. Failure to give such a name clearing hearing can give rise to monetary damages for deprivation of a liberty interest. Id.

To succeed on a Section 1983 claim for denial of a name clearing hearing, the First Circuit requires the employee to prove: (1) that he was discharged; (2) that defamatory charges were made against him in connection to the discharge; (3) that the charges were false; (4) that no meaningful public hearing was conducted pre-discharge; (5) that the charges were made public; (6) that the employee requested a hearing to clear his name; and (7) that the request was denied. Rosenstein, 876 F. 2d at 395-96.

Public officials do not act improperly in publicly disclosing criminal charges against discharged employees, but they must thereafter afford procedural due process to the person charged. Rosenstein, 876 F. 2d at 395. That is, the defendants were not required to tender a name clearing hearing to the plaintiff prior to publicly disclosing the charges against him. See id. at 396, n 8. The defendants

deprived the plaintiff of a liberty interest only if they denied his request for a name clearing hearing. See id The record points to no evidence that suggests the plaintiff even requested a name clearing hearing, or that one was denied. Furthermore, the Court notes that a t both the post-disciplinary hearing and the appeal, Macklin never raised the this issue. Thus, plaintiff's defemation claims are also dismissed.

Accordingly,

IT IS ORDERED: that the defenddants' motion for summary judgment is GRANTED. Plaintiff's cross-motion for summary judgment is DENIED.

New Orleans, Louisiana November 19, 2001.

MARTIN L. C. FELDMAN
U. S. DISTRICT JUDGE

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this 9th day of November 2002, forty copies of the above and foregoing Supplement appendix were mailed to the Clerk of the Supreme Court of the United States of America, Washington D.C. I certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the person(s) identified below by depositing the same in the United States mail at New Orleans, Louisiana, first class, postage prepaid, and properly addressed to

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